

GASS WEBER MULLINS LLC

309 N WATER ST MILWAUKEE, WI 53202
TEL 414 223 3300 FAX 414 224 6116
WWW.GASSWEBERMULLINS.COM



J. RIC GASS
DIRECT DIAL: 414 224-7697
gass@gasswebermullins.com

March 21, 2008

The Honorable William C. Griesbach
United States District Court
Eastern District of Wisconsin-Green Bay Division
125 South Jefferson Street
Green Bay, WI 54305-2490

Re: *Appleton Papers Inc., et al. v. George A. Whiting Paper Co.*
Case No. 08-CV-0016

Dear Judge Griesbach:

During the status conference on February 6, 2008, you indicated that it would be helpful to receive additional background information about the environmental conditions at issue in this case and the parties involved. You also expressed an interest in receiving an explanation of some of the terminology that will figure prominently in this case. This letter is being submitted in response to those requests.

In preparing this letter, we have tried to present an objective summary and to rely as much as possible on government reports.¹ We have also purposefully avoided issues that are disputed among the parties and that this suit is designed to adjudicate – such as each party's responsibility for the PCB contamination.

The Lower Fox River Site.

At issue in this case is what the government agencies call the Lower Fox River Site. The Lower Fox River Site includes the Lower Fox River and also the Bay of Green Bay. *Unilateral Administrative Order issued by EPA, November 13, 2007 ("Order")*, p. 5.² The Lower Fox River is a 39-mile section of the Fox River extending from the outlet of Lake Winnebago at

¹ We have included web references to these documents (use control and click to activate). However, if the Court would prefer paper copies, we would be pleased to provide them.

² <http://www.epa.gov/Region5/sites/foxriver/pdf/fox-river-uao-20071113.pdf>.

Neenah to the mouth of the Fox River at the City of Green Bay. *Record of Decision, Operable Units 3, 4 and 5 Lower Fox River and Green Bay*, pp. 1-2 (“Downriver ROD”).³ The Lower Fox River flows northeast and drops approximately 170 feet before reaching the mouth of Green Bay. *Id.* It is the largest tributary to Green Bay. *Id.*

The government agencies have divided the Lower Fox River Site into five sections for purposes of planning the clean-up (or “remediation”) of the river; these sections are called “Operable Units.” *Order*, p. 5. Operable Unit 1 (“OU 1”), also known as Little Lake Butte des Morts, extends from the outlet of Lake Winnebago to the Appleton dam. *Id.* Operable Unit 2 (“OU 2”) extends from the Appleton dam to Little Rapids. *Id.* Operable Unit 3 (“OU 3”) extends from Little Rapids to the De Pere dam. *Id.* Operable Unit 4 (“OU 4”) extends from the De Pere dam to the mouth of Green Bay (approximately 7 miles). *Id.* Operable Unit 5 (“OU 5”) is the Bay of Green Bay. *Id.*

PCBs in the Fox River.

The government has estimated that there are more than 11 million cubic yards of PCB-contaminated sediment between Lake Winnebago and the mouth of Green Bay. *Downriver ROD*, p. A-2. Sediment in rivers and bays is the sand, silt, mud, etc. that is deposited on the bottom of the river or bay and/or suspended in the water.

PCBs are a group of 209 closely-related chemicals that were produced in the United States between 1929 and 1978. PCBs were used as industrial coolants, insulators, lubricants and solvents (such as in carbonless copy paper). *See PCB Fact Sheet*.⁴ PCBs were widely used because they were stable, had a high heat capacity, and did not easily degrade. *Id.* The 209 individual PCB chemicals are called “congeners,” and PCBs generally appear in the environment as mixtures of these congeners. PCBs were sold in various mixtures of congeners, often under the trade name “Aroclor”; as a result, the different commercially-solid PCB mixtures are usually called different “Aroclors.” The mixture most often found in the sediments in the Lower Fox River is Aroclor 1242.

Sources of the PCB Contamination.

There are eight facilities which have been formally identified by the United States Environmental Protection Agency (“USEPA”) as having discharged PCBs into the Lower Fox River. They are, according to location on the Lower Fox River, from south to north (see map attached as Exhibit 1):

The papermaking facility located at 225 W. Wisconsin Avenue in Neenah. *Order*, p. 8-9. This facility is located at the southern end of OU 1. *Id.* According to the Order, this facility discharged wastewater directly to the Lower Fox River. *Id.* Between 1954 and 1979, this facility was owned and operated by Bergstrom Paper Company. *Id.* In 1979, Bergstrom was acquired by Glatfelter. *Id.*

³ http://www.epa.gov/Region5/sites/foxriver/pdf/rod_06302003.pdf.

⁴ <http://dhfs.wisconsin.gov/ch/ChemFS/fs/PCB.htm>.

The papermaking facility located at 69 Washington Street in Menasha. *Id.*, pp. 9-10. This facility is located in OU 1. *Id.* According to the Order, this facility discharged wastewater to the Neenah-Menasha Sewerage District's wastewater collection system and publicly-owned treatment works, and the Neenah-Menasha Sewerage District in turn discharged to the Lower Fox River. *Id.* The facility also discharged a portion of its wastewater directly to the Lower Fox River. *Id.* Between 1954 and 1969, this facility was owned and operated by the John Strange Paper Company. *Id.* In 1969, John Strange Paper Company was acquired by Menasha Corporation. *Id.* In 1983, the facility was sold to U.S. Paper Corp. *Id.*

The papermaking facility located at 190 Tayco Street in Menasha. *Order*, p. 9. This facility is located in OU 1. *Id.* According to the Order, this facility discharged wastewater to the Neenah-Menasha Sewerage District's wastewater collection system and publicly-owned treatment works, and the Neenah-Menasha Sewerage District in turn discharged to the Lower Fox River. *Id.* After 1976, the facility also discharged wastewater directly to the Lower Fox River. *Id.* Between 1954 and 1999, this facility was owned and operated by Wisconsin Tissue Mills, Inc. (which later changed its name to WTM I Company). *Id.* In 1999, the facility was sold to Georgia-Pacific Tissue, LLC. *Id.*

The papermaking facility located at 800 S. Lawe Street in Appleton. *Id.*, p. 10-11. This facility is located in OU 2. *Id.* According to the Order, this facility discharged wastewater to the City of Appleton's wastewater collection systems and publicly-owned treatment works, and the City of Appleton in turn discharged to the Lower Fox River. *Id.* From 1954 to the present, this facility has been owned and operated by Riverside Paper Company (or its predecessor Kerwin Paper Company). *Id.* In 2007, Riverside changed its name to CBC Coating, Inc. *Id.*

The papercoating facility located at 825 E. Wisconsin Avenue in Appleton. *Id.*, pp. 6-8. This facility is located in OU 2 and is not adjacent to the Fox River. *Id.* According to the Order, this facility discharged wastewater to the City of Appleton's wastewater collection systems and publicly-owned treatment works, and the City of Appleton in turn discharged to the Lower Fox River. *Id.* Between 1954 and 1970, this facility was owned and operated by Appleton Coated Paper Company. *Id.* In 1970, Appleton Coated Paper Company was acquired by NCR Corporation. *Id.* In 1978, the facility was sold to Appleton Papers Inc. *Id.*

The papermaking facility located at 540 Prospect Avenue in Combined Locks. *Id.* This facility is located in OU 2. *Id.* According to the Order, this facility discharged wastewater directly to the Lower Fox River. *Id.* Between 1954 and 1969, this facility was owned and operated by Combined Papers Mills, Inc. *Id.* In 1969, Combined Paper Mills, Inc. was acquired by NCR Corporation. *Id.* In 1978, the facility was sold to Appleton Papers Inc. *Id.* In 2000, ownership of this facility passed to Appleton Coated LLC. *Id.*

The papermaking facility located at 824 Fort Howard Avenue in De Pere. *Id.*, pp. 11-12. This facility is located at the southern end of OU 4. *Id.* According to the Order, this facility discharged wastewater directly to the Lower Fox River, and then sometime after 1970,

the facility discharged its wastewater to the City of De Pere's wastewater collection system and publicly-owned treatment works, and the City of De Pere in turn discharged to the Lower Fox River. *Id.* Between 1954 and the present, this facility has been owned and operated by U.S. Paper Corp. (and/or one or more of its corporate predecessors). *Id.*

The papermaking facility located at 1919 S. Broadway in Green Bay. *Id.*, pp. 12-13. This facility is located in OU 4. *Id.* According to the Order, this facility discharged wastewater directly to the Lower Fox River. *Id.* Between 1954 and 1997, this facility was owned and operated by Fort Howard Paper Company (which later changed its name to Fort Howard Corporation). *Id.* In 1997, Fort Howard was acquired by James River Corporation and became Fort James Operating Company. *Id.* In 2006, Fort James Operating Company became Georgia-Pacific Consumer Products LP. *Id.*

These are not all the facilities that released PCBs into the Lower Fox River Site. There were a number of other industrial and papermaking facilities that discharged PCBs as well. An example is the facility owned and operated by Defendant George Whiting Paper Company, located in OU 1. Several municipalities and units of local government also discharged PCBs into the river. Some of these municipalities operated treatment plants that processed wastewater from nearby papermaking facilities and other industries, and in the process released PCBs into the river. Finally, the United States Army Corps of Engineers dredged and disturbed sediment from the Lower Fox River Site and disposed of that sediment in other parts of the Lower Fox River Site.

Cleanup Work

In the mid-1990s, Appleton Papers, NCR, Glatfelter, WTM I, CBC Coating, U.S. Paper and Georgia-Pacific Consumer Products joined together to form the Fox River Group. One of the purposes of the Fox River Group was to identify and evaluate methods to address environmental issues at the Lower Fox River Site. Among other things, the members of the Fox River Group signed an agreement with the State of Wisconsin in January 1997 pursuant to which they paid for and participated in projects that removed over 2,000 pounds of PCBs from the Lower Fox River Site. The members of the Fox River Group performed this work between 1997 and 2001.

On December 10, 2001, a Consent Decree involving Appleton Papers, NCR, the United States and the State of Wisconsin was approved and entered. *United States of America and the State of Wisconsin v. Appleton Papers Inc. and NCR Corporation*, 2:01-cv-00816-LA.⁵ Under the terms of this Consent Decree, Appleton Papers and NCR agreed to provide \$41,500,000 over four years to fund, among other things, response action and natural resource damages restoration projects at the Lower Fox River Site. In December 2005, Appleton Papers and NCR agreed to extend the 2001 Consent Decree for an additional year to allow funding of certain additional natural resource damage restoration projects and assessment costs.

⁵ <http://www.epa.gov/Region5/sites/foxriver/pdf/Aug01consentdecree.pdf>.

In 2002, USEPA and the Wisconsin Department of Natural Resources (“WDNR”) issued a Record of Decision for Operable Units 1 and 2. *Record of Decision Operable Unit 1 and Operable Unit 2 Lower Fox River and Green Bay Site (“Upriver ROD”).*⁶ Under USEPA’s Superfund program, a “Record of Decision” documents the government’s selection of a cleanup remedy for a site. Among other things, the Upriver ROD requires full-scale environmental dredging of an estimated 784,000 cubic yards of sediment containing PCBs in excess of 1 ppm. *Upriver ROD, p. A-1.* In 2003, WTM I agreed to prepare the engineering design for implementing the Upriver ROD. *Order, p. 14.* Then, in 2004, Glatfelter and WTM I entered into a consent decree pursuant to which they agreed to implement that remedy set forth in the Upriver ROD. *United States of America and the State of Wisconsin v. P.H. Glatfelter Company and WTM I Company*, 2:03-cv-00949-LA.⁷

In 2003, USEPA and WDNR issued a Record of Decision for Operable Units 3-5, identified above as the Downriver ROD. Among other things, the Downriver ROD calls for full-scale environmental dredging of an estimated 6.6 million cubic yards of sediment containing PCBs in excess of 1 ppm. *Order, p. 15.* In 2004, NCR and Georgia-Pacific agreed to prepare the engineering design for the Downriver ROD. *Order, p. 14.* In addition, in 2006, NCR and U.S. Paper entered into a consent decree pursuant to which they agreed to undertake Phase 1 of the cleanup work in OU 4. *United States of America and the State of Wisconsin v. NCR Corporation and Sonoco-US Mills Inc.*, 2:06-cv-00484-LA.⁸ In 2007, USEPA and WDNR issued a Record of Decision Amendment that modified certain aspects of the Downriver ROD. *Order, p. 14.*⁹

In 2007, USEPA issued an order under Section 106 of CERCLA requiring eight entities – Appleton Papers, CBC Coating, Georgia-Pacific Consumer Products, Menasha, NCR, Glatfelter, U.S. Paper and WTM I – to perform the remaining work (designated as “Phase 2”) required to implement the Downriver ROD. In particular, the Order requires that the engineering design of the remedy be completed no later than 2008, and that full-scale dredging work in the river commence no later than 2009. It is expected that this work will cost significantly more than the \$390 million estimate set forth in the 2007 Record of Decision Amendment.

Very truly yours,



J. Ric Gass

JRG:kjb
Enclosure

cc: Counsel of Record (via ECF System), w/encl.

⁶ http://www.epa.gov/Region5/sites/foxriver/pdf/rod_12202002.pdf.

⁷ <http://www.epa.gov/Region5/sites/foxriver/pdf/consent-decree-operable-unit-1-20071220.pdf>.

⁸ http://www.epa.gov/Region5/sites/foxriver/pdf/consent_decree_200604.pdf.

⁹ <http://www.epa.gov/Region5/sites/foxriver/pdf/rodfinal20070628.pdf>.

GLOSSARY OF FREQUENTLY-USED TERMS

“106 Order” or “Order” or “Unilateral Order” or “UAO” means the Unilateral Administrative Order issued by U.S. EPA on November 13, 2007. A 106 Order is a document signed by U.S. EPA under section 106 of CERCLA (42 U.S.C. § 9606) directing an entity to take a cleanup action or refrain from an activity.

“2002 ROD” or “Upriver ROD” means the Record of Decision for Operable Unit 1 and Operable Unit 2 that was signed by U.S. EPA on December 20, 2002.

“2003 ROD” or “Downriver ROD” means the Record of Decision for Operable Unit 3, Operable Unit 4, and Operable Unit 5 that was signed by U.S. EPA on June 30, 2003.

“2007 ROD Amendment” means the Record of Decision Amendment for Operable Unit 2 (Deposit DD), Operable Unit 3, Operable Unit 4, and Operable Unit 5 (River Mouth) that was signed by U.S. EPA on June 27, 2007.

“Aroclor” means a mixture of PCBs.

“CERCLA” means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9675.

“Downriver ROD” or “2003 ROD” means the Record of Decision for Operable Unit 3, Operable Unit 4, and Operable Unit 5 that was signed by U.S. EPA on June 30, 2003.

“FS” means Feasibility Study. An FS is an analysis to determine the remedial alternatives which may be implemented at a CERCLA site.

“NCP” means the National Contingency Plan regulations promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300. The NCP sets forth the procedures and standards for responding to releases under CERCLA.

“Order” or “106 Order” or “Unilateral Order” or “UAO” means the Unilateral Administrative Order issued by U.S. EPA on November 13, 2007. A 106 Order is a document signed by U.S. EPA under section 106 of CERCLA (42 U.S.C. § 9606) directing an entity to take a cleanup action or refrain from an activity.

“OU” means **“Operable Unit.”** An OU is a discrete response measure at a CERCLA site. Separate OUs are often used at CERCLA sites covering large areas. The Fox River site has five OUs.

“PCBs” means polychlorinated biphenyls. PCBs are a group of 209 chemicals that were produced in the United States from 1929 to 1978.

“PRP” means “potentially responsible party.” A PRP is an entity that has potential liability under CERCLA for cleanup costs or natural resource damages.

“**RI**” means Remedial Investigation. An RI consists of technical studies (which may include on-site and off-site activities such as monitoring, sampling and analysis) to investigate the scope of contamination at a CERCLA site.

“**RI/FS**” means Remedial Investigation/Feasibility Study. An RI/FS consists of technical studies to investigate the scope of contamination at a CERCLA site (the RI), as well as an analysis to determine the remedial alternatives which may be implemented at such site (the FS).

“**RODs**” means “Records of Decision,” and here they include the 2002 ROD (also known as the Upriver ROD) and the 2003 ROD (also known as the Downriver ROD), as amended and supplemented by the 2007 ROD Amendment. A ROD, which follows completion of the RI/FS, identifies the remedial alternative chosen for implementation at a CERCLA site.

“**Response Agencies**” means U.S. EPA and WDNR.

“**SOW**” means Statement of Work. A SOW outlines the major components of certain cleanup work to be performed. A SOW is often followed by a Work Plan.

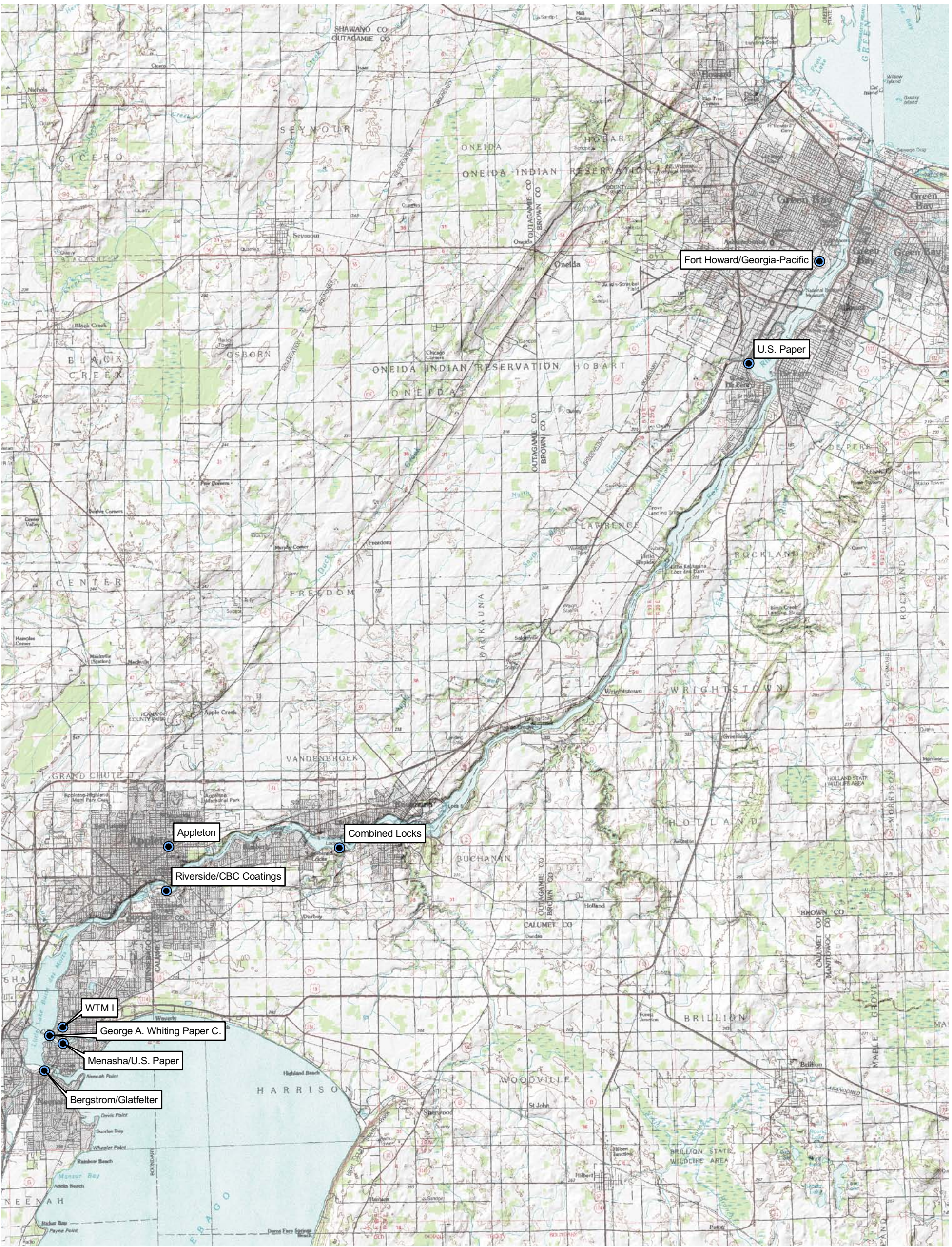
“**UAO**” or “**106 Order**” or “**Unilateral Order**” or “**Order**” means the Unilateral Administrative Order issued by U.S. EPA on November 13, 2007. A 106 Order is a document signed by U.S. EPA under section 106 of CERCLA (42 U.S.C. § 9606) directing an entity to take a cleanup action or refrain from an activity.

“**Unilateral Order**” or “**106 Order**” or “**Order**” or “**UAO**” means the Unilateral Administrative Order issued by U.S. EPA on November 13, 2007. A 106 Order is a document signed by U.S. EPA under section 106 of CERCLA (42 U.S.C. § 9606) directing an entity to take a cleanup action or refrain from an activity.

“**Upriver ROD**” or “**2002 ROD**” means the Record of Decision for Operable Unit 1 and Operable Unit 2 that was signed by U.S. EPA on December 20, 2002.

“**U.S. EPA**” or “**EPA**” means the United States Environmental Protection Agency.

“**WDNR**” means the Wisconsin Department of Natural Resources.



NOTES

1. BASE MAP FROM USGS 150,000 SCALE METRIC TOPOGRAPHIC MAPS. 1984 (PHOTO INSPECTED 1986-87) (APPLETON, GREEN BAY, MAINTOWOC, AND SHAWANO QUADRANGLES).
2. LOCATIONS CORRESPOND TO STREET ADDRESS OF FACILITY.



0 2.5 5
MILES
1" EQUALS 2.5 MILES
1:158,400

SCALE TEXT (PAGE UNITS EQUALS MAP UNITS) IS ONLY VALID IF MAP IS PRINTED AT ITS ORIGINAL SCALE. ALWAYS VERIFY MEASUREMENTS AGAINST THE GRAPHIC SCALEBAR.